Complex Adjudication Issues in Adjustment of Status and Waivers of Inadmissibility

Judge H. Kevin Mart & Judge Earle B. Wilson
2018 Executive Office for Immigration Review
Legal Training Program

Course Learning Objectives

By the completion of this session, attendees should

- General concept regarding "admission" for the purpose of adjustment of status applications;
- Be familiar with issues regarding the Child Status Protection Act and recent Ninth Circuit precedent regarding automatic conversion of visa petitions for minor children of lawful permanent residents to immediate relatives of United States citizens;
- Understand Temporary Protected Status and parole into the United States;
- Be familiar with the varying federal court approaches to whether Temporary Protected Status constitutes a valid admission to the United States for purposes of adjustment of status under section 245(a) of the Immigration and Nationality Act; and
- Understand the statutory and relevant case law requirements for evaluating waivers of inadmissibility for respondents seeking to adjust status.

Course Learning Objectives

Adjustment of Status Discussion

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Adjustment of Status Requirements Before the Court

- Have been inspected and admitted or paroled or grandfathered in under 245(i) (exception VAWA self-petitioners, SIJs, and some parolees)
- Eligible and Admissible
- Have an immigrant visa be immediately available (immediate relative or priority date current)
- Background Checks complete
- Current Medical Exam in Sealed Envelope
- Affidavit of Support or I-864W (in family-based cases)
- Not ineligible under § 245(c) for unauthorized work or lack of valid non-immigrant status (exception immediate relatives, SIJs, and VAWA self-petitioners)
- Discretion

Admitted or Paroled

- "Inspected and admitted or [inspected and] paroled."
  - Must have been legally admitted or paroled by an immigration officer a port of entry.
  - Inspected
- Admission requires a lawful entry into the United States after inspection and authorization by an immigration officer. INA § 101(a)(13)(A).
- Admitted at the border
  - Returning LPR
  - NIV or IV visa

Admitted When Waived In

- Can prove admitted if "waived in" at the border. *See Matter of Areguillin*, 17 I&N Dec. 308, 310 (BIA 1980).
  - Requires Respondent prove "procedural regularity" of his or her entry, but does not require respondent to have been questioned by immigration officials or admitted in a particular status. *Id.*, *see also Matter of Quilantan*, 25 I&N Dec. 285, 289 (BIA 2010).
  - Immigration Judges may hold a special hearing and take testimony to resolve this issue.

Persons Deemed "Admitted"

- Admitted by Grant of TPS
  - Sixth and Ninth Circuit have found that a grant of TPS is an admission. *Flores v. U.S. Citizenship and Immigration Services*, 718 F.3d 548 (6th Cir. 2013); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017).
  - Eleventh Circuit has found that a grant of TPS is not an admission. *Serrano v. U.S. Atty. Gen.*, 655 F.3d 1260 (11th Cir. 2011).
- Admitted at the border under a Grant of TPS
  - Entry at the border while under a grant of TPS as an admission.
  - Fifth Circuit has explained that during a grant of TPS, when the alien has left the country and returned, this admission is still deemed an admission even after TPS expires. *Gomez v. Lynch*, 831 F.3d 652 (5th Cir. 2016).

Persons Deemed Paroled

- "Parole" is granted to an alien outside the country to allow him to apply for admission but are either inadmissible or do not have a legal basis for being admitted to the United States. INA § 212(d)(4)
- Parole is not an admission. INA § 212(a)(13)(B).
- "Parole in place"
  - USCIS extended parole authority to grant people who are physically in the U.S. a "status" that would allow them to remain lawfully and in some cases adjust their status.
  - In effect, it allows a person who is EWI to be paroled and thereafter become eligible to AOS.
  - USCIS has formalized this procedure for the spouses, children and parents of active duty, reserves, and previous members of the military.

Arriving Aliens

- The term "arriving alien" means an alien who seeks admission to or transit through the United States, as provided in 8 C.F.R. § 1235.1, at a port of entry. 8 C.F.R. § 1001.1(q).
  - Remains an arriving alien even if paroled under INA § 212(d)(5) and even after such parole has been revoked or terminated.
- Ineligible to adjust before an Immigration Judge unless they returned on advanced parole, USCIS denied their application, they are placed in proceedings, and they are renewing the previously filed AOS application.

Advanced Parole

- "Advance parole" lets an alien leave the country without jeopardizing his immigration status.
  - Type of parole? Promise of parole? Different concepts?
    - *Samirah v Holder*, 637 F.3d 652 (7th Cir. 2010) ("Samirah II").
    - *Succar v. Ashcroft*, 394 F.3d 8, 15 n. 7 (1st Cir 2005).
    - *Ibragimov v. Gonzales*, 476 F 3d 125, 132 (2d Cir 2007).
    - *Barney v. Rogers*, 83 F.3d 318, 321 (9th Cir. 1996).
    - *Matter of G–A–C–*, 22 I&N Dec. 83, 88–89 (BIA 1998) (en banc).

Advanced Parole under DACA

- DACA recipients may be eligible to receive advanced parole.
- If a DACA recipient receives a grant of advanced parole, leaves and then returns to the Untied States, is he or she now "paroled in" for purposes of AOS?
  - In 2016, USCIS reported that as of December 31, 2015, 5,068 DACA recipients who were granted advanced parole applied for Adjustment of Status and of those, 2,944 DACA recipients were granted.

Arriving Aliens After Return on Advanced Parole

- Is the alien deemed an "arriving alien" after he or she arrives to the U.S. pursuant to a grant of advanced parole?
  - In a bond redetermination, the Board held that an alien who arrives in the U.S. pursuant to a grant of advance parole is an "arriving alien" as that term is defined in the regulations. *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998).
  - In a case discussing the revocation of advanced parole, the Seventh Circuit stated that an alien granted advanced parole is not an arriving alien. *Samirah v. Holder*, 627 F.3d 652, 658 (7th Cir. 2010); 8 C.F.R. § 1.2.

Petition Immediately Available

- For preference immigrants, the visa must be available at the time the adjustment application is filed.
- To determine whether a visa number is currently available, we must consult the Visa Bulletin which is published monthly by the U.S. Department of State. The priority date is current or that the applicant is immigrating in a category for which there is no waiting list (e.g., immediate relatives). *See* INA § 245(a).
- The Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (2002), created a formula which allows children who turn 21 during the immigration process to continue to be treated as children to avoid their being "aged out" and separated from the rest of their families.

"Age" at Naturalization of Parent

- Under INA § 201(f)(2), when a petition is initially filed for child of LPR and then the LPR parent naturalizes, the petition converts to either adult child of USC or minor child of USC. The determination whether the alien qualifies as a "minor child" shall be made using the *age* of the alien on the date of the parent s naturalization.

Board and Ninth Circuit Split on "Age"

- The Board says statue is clear and that "age" refers to alien's actual age at the time of naturalization. *Matter of Zamora-Molina*, 25 I&N Dec. 606 (BIA 2011). If "aged out" at the time parent naturalizes, petition converts to that of an adult child of USC.
- Ninth Circuit disagreed finding that the statue was ambiguous and that "age" refers to the statutory age as found with formula under INA § 203(h)(1). *Tovar v. Sessions*, 882 F.3d 895 (9th Cir. 2018). The child's "age" is their biological age on the date of naturalization subtracted by the period the initial visa pended. Therefore, anyone who qualified as a minor child for the initial visa for child of LPR on the date of parent's naturalization also qualifies as a minor child for purposes of obtaining an immediate relative visa based on that naturalization.

Guidance of Medicals

- Adjustment applicants must show they are not inadmissible on health-related grounds under INA § 212(a)(1)(A) by completing a Form 1-693, Report of Medical Examination and Vaccination Record, completed by a designated civil surgeon.
- The medical examination documentation indicates whether the applicant has either a Class A or Class B medical condition and the vaccination record shows whether the applicant has complied with all vaccination requirements.

Guidance of Medicals (continued)

- Class A conditions are medical conditions that render a person inadmissible and ineligible for a visa or adjustment of status. Class A conditions are medical conditions mentioned in INA § 212(a)(1)(A). Types:
  - Communicable disease of public health significance per HHS regulation;
    - Syphilis, Leprosy, and TB in their infection stage;
  - A failure to present documentation of having received vaccinations against vaccine-preventable diseases;
  - Present or past physical or mental disorder with associated harmful behavior or harmful behavior that is likely to recur; and
  - Drug abuse or addiction.

Guidance of Medicals (continued)

- Class B conditions are defined as physical or mental health conditions, diseases, or disability serious in degree or permanent in nature. This may be a medical condition that, although not rendering an applicant inadmissible, represents a departure from normal health or well-being that may be significant enough to:
  - Interfere with the applicant s ability to care for himself or herself, to attend school, or to work; or
  - Require extensive medical treatment or institutionalization in the future.

Judges Roles on Affidavits of Support

- Affidavits are filed on Form I-864 and required in family-based AOS cases. *See* INA § 213; 8 CFR § 213a. A Form I-864 constitutes a binding contract between the sponsor the US government. *See* INA § 213A.
- Sponsor must show they can support application at 125% above the poverty level.
  - Exemptions apply to individuals who may be credited with 40 quarters of earnings by SSA; and children who will become USC automatically upon adjustment.
  - Those sponsors with exemptions must file a Form I-864W instead of an affidavit of support.

Judges Roles on Affidavits of Support (continued)

- What are we looking for in the Affidavits of Support?
  - Vehicle to prove applicant is not likely to be a public charge under INA § 212(a)(4).
  - Proof sponsor submitted most recent year's tax returns;
    - Special circumstances may require proof of last three years.
  - Proof of citizenship or permanent residence status;
  - Proof of domicile.

Judges Roles on Affidavits of Support (continued)

- If don't meet income requirements, may use a joint-sponsor.
- If using assets to meet requirements:
  - For a spouse: Three times the difference in the sponsor's income and the 125% needed according to the poverty guidelines.
  - For any other relative: Five times the difference in the sponsor's income and the 125% needed according to the poverty guidelines.

Cuban Refugee Adjustment Act

- Typically arriving aliens.
  - What if not arriving aliens?
    - Visas
    - Cuban EWIs favorably given parole by USCIS
- Must have at least one year of aggregate physical presence in the U.S. before applying for benefits.
- Immigration Courts do not have jurisdiction over Cuban Adjustment cases unless the alien has been placed in removal proceedings after returning to the United States pursuant to a grant of advance parole to pursue a previously filed application. *Matter of Martinez-Montalvo*, 24 I&N Dec. 778 (BIA 2009).
  - Courts still have jurisdiction over removal proceedings of arriving Cuban aliens. *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011).

Thorny Adjustment Issues

- What if the petitioner does not show up for the AOS hearing?
- What if the couple has been separated but are legally still married?
- Should the Court question the bona fides of a marriage when there is a valid I-130?
- What if, two days after Respondent has his interview with USCIS for AOS, he is served with a NTA. He is granted AOS and USCIS issues him his green card. What should the Immigration Judge do during the Respondent's proceedings?
- Does the Court have authority to terminate a case without the government's consent? Or without a response?

Course Learning Objectives

Waivers of Inadmissibility Discussion

Waiver under section 212(h)

- Can waive conviction for CIMT, other crimes under INA § 212(a)(2)(A)(I), (II), (B), (D), (E), or simple possession of 30 g or less of marijuana only.
- Must be parent, spouse, son or daughter of USC or LPR and extreme hardship or 15 years since crime and rehabilitation.
- For those with "violent or dangerous crimes," required to meet heighten standard of exceptional and extremely unusual hardship.

Waiver under section 212(h) (continued)

- Not available to individual who has been previously "admitted" as an LPR, if, since that admission, has been convicted of an aggravated felony or has not lawfully resided continuously in US for 7 years preceding initiation of removal proceedings. *Matter of Yeung*, 21 I&N Dec. 610 (BIA 1997); *Matter of Ayala*, 22 I&N Dec. 398 (BIA 1998); *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015).
- Available for LPRs as a standalone waiver only for arriving aliens. *Matter of Chavez-Alvarez*, 26 I&N Dec. 274, 282 (BIA 2014).

Waiver under Section 212(i)

- Can waive fraud or misrepresentation under § 212(a)(6)(i).
- Must be a spouse or child of a USC or LPR and extreme hardship.
  - Unlike a 212(h) waiver which allows parents of USC or LPR.
- Does not waive false claim to US citizenship.

Waiver under Section 212(a)(9)

- Can waive unlawful presence or previous removal under INA § 212(a)(9).
  - Form I-212; or Form I-601& G-325A depending on how inadmissible.
- Must have been inspected upon reentry.
  - Those who reenter without inspection after accumulating one year of unlawful presence or being deported are subject to a harsher bar, contained in INA § 212(a)(9)(C)(i) and cannot ordinarily be waived in the context of adjustment of status.
- Must be spouse or child of USC or LPR and extreme hardship to anchor relative.
- Form I-601A, Provisional Unlawful Presence Waiver
  - Allows pre-adjudication in the U.S. of the waiver for the 3/10 year bar to consular process outside the U.S.
  - I-130 recipients and removal proceedings must be administratively closed.

Waiver under Section 237(a)(1)(H)

- Waives fraud and material misrepresentation.
  - Fraud in the course of adjustment of status may be waived under INA § 237(a)(1)(H) (with qualifying relative). *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015).
- Must be the spouse, parent, son or daughter of a USC or LPR.
- Must have been in possession of an immigrant visa at the time of entry.
- Must have been otherwise admissible at the time of entry except for § 212(a)(5)(A) [no labor certification] and § 212(a)(7)(A) [no valid, unexpired immigrant visa] which were a direct result of the fraud or misrepresentation.
- There is no paper application for this waiver.

Administrative Closures and Terminations for I-601A Waivers

- Recent case law does not affect administrative closures allowed under regulatory authority. *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).
- With respect to applications for I-601A waivers, Immigration Judges should consult footnote 9 of *Castro-Tum*, 27 I&N Dec. at 287, which holds that the DHS regulation regarding the processing of that application "cannot be an independent source of authority for administrative closure."
- Is termination or voluntary departure the proper avenue after an I-601A waiver has been granted?

Questions?

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